SUMMARY OF THE 2009 – 2010 U.S. SUPREME COURT DECISIONS FOR TRIAL DOGS

Summaries of Opinions and Cases Granted Review by
The NAAG Supreme Court Project,

Dan Schweitzer, Director
750 First St., N.E., Suite 1100
Washington, D.C. 20002
Dschweitzer@NAAG.ORG

By: Richard M. Wintory

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MIRANDA

Maryland v. Shatzer, 08-680. The Court, without dissent, held that the "presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477 (1981)," does not apply when a suspect has been "released from his pretrial custody and has returned to his normal life for some time" prior to officers again attempting interrogation. The Court established a bright-line rule that officers may attempt interrogation 14 days after the suspect has been released from custody. Respondent Michael Blaine Shatzer was incarcerated in a Maryland prison after conviction of an unrelated offense when investigators received information that he had previously sexually abused his 3-year-old son. In August 2003, a detective met with Shatzer in the facility. The detective read Shatzer his *Miranda* rights, and attempted to question him. Shatzer initially waived but later invoked his right to counsel. The detective stopped the questioning and returned Shatzer to prison custody. Upon receipt of additional information, in March 2006 another detective met with Shatzer, again in a state prison. This time, after again being read his *Miranda* rights, Shatzer waived his rights and spoke with the detective. Shatzer admitted some inappropriate behavior but did not admit to sexual contact with the child. He also agreed to take a polygraph test, which he failed. Upon additional questioning, Shatzer gave an inculpatory statement. At trial, Shatzer moved to suppress the statement based on *Edwards* and his previous invocation of his right to counsel. *Edwards* held that, after a suspect has invoked his right to counsel, police may not initiate further interrogation absent counsel, even if the suspect again agrees to waive his *Miranda* rights. The trial judge denied the motion based on the "break in custody." The Maryland Court of Appeals disagreed, rejecting the "break in custody" theory and finding no time limit to *Edwards*. The court also held that, even if a break in custody was sufficient to extinguish the *Edwards* protections, "Shatzer's release back into the general prison population between interrogations did not constitute" a sufficient break. In an opinion by Justice Scalia, the Court reversed, adopting the "break in custody" theory.

The Court looked to the rationale of *Edwards*, which was to protect a suspect from pressures incident to custody that may "compel" a statement, and to ensure respect of the suspect's right to speak only through or with counsel. In furtherance of that goal, *Edwards* established a presumption of involuntariness for statements obtained after a suspect invoked his right to counsel and police initiated further interrogation. The Court found, however, that once "a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced." The Court reasoned that after release, a suspect is free from the "isolation" of custody and may interact with friends, family, or counsel. He is not only aware of his rights, but he is also aware that

invoking his right to counsel ends questioning, and "that investigative custody does not last indefinitely." Thus, the need to dispel "coercive pressures" no longer exists.

For clarity in application, the Court announced a bright-line rule that officers may not request to question a suspect again until 14 days after the suspect has been released from custody. The Court found that 14 days is sufficient time "for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." And the 14-day rule prevents police from abusing the "break in custody" rule by "releas[ing] the suspect briefly (to end the *Edwards* presumption) and then promptly bring[ing] him back into custody for reinterrogation." Lastly, the Court considered whether Shatzer's release into the "general prison population" constituted a break in custody. Finding a "disconnect[]" between the imprisonment and any benefit or detriment related to questioning on a separate matter, the Court found that "lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda.*" An incarcerated individual's release into the general population is a return to his normal life as it is lived pursuant to that separate incarceration. The Court concluded that "'the inherently compelling pressures' of custodial interrogation ended when" Shatzer rejoined "his normal life" in the general prison population.

Justice Thomas wrote a concurring opinion in which he agreed with the "break in custody" rule and the Court's holding that the return to the general prison population establishes a break in custody, but rejected "the Court's decision to extend the presumption of involuntariness" for 14 days after release from custody. Justice Stevens wrote a separate concurring opinion which agreed that the break in the instant case was sufficient, and also agreed that the *Edwards* protections are not "eternal." Justice Stevens, however, did not agree with a bright-line rule "that *Edwards always* ceases to apply when there is a 14-day break in custody."

Berghuis v. Thompkins, 08-1470. In a 5-4 decision, the Court set forth new guidelines on the invocation and waiver of a suspect's right to remain silent after receiving *Miranda* warnings. Specifically, the Court held that (1) respondent did not invoke his right to remain silent through his silence during a three-hour interrogation, (2) a suspect must "unambiguously" express his right to remain silent to end the interrogation, and (3) respondent waived his right to remain silent when he knowingly and voluntarily made a statement to the police near the end of the interrogation. Thompkins was suspected of firing multiple shots into a crowd of people outside a shopping mall in Southfield, Michigan, one of which killed Samuel Morris. About a year after the shooting, Thompkins was found in Ohio. While he was awaiting transfer back to Michigan, two Southfield police officers traveled to Michigan and interviewed him. They advised Thompkins of his *Miranda* rights, and read aloud one of the paragraphs from the written

Miranda form. He refused, however, to sign the form. There was conflicting testimony as to whether Thompkins verbally indicated his understanding of his rights. After reading the *Miranda* form, the officers proceeded to question Thompkins for approximately two hours and forty-five minutes. Thompkins remained silent throughout most of the interrogation, indicating little more than that "the chair he was sitting in was hard" and declining an offer of a peppermint. At the end of the questioning, however, the detective asked Thompkins if he believed in God; Thompkins said "yes." The detective asked if he prayed to God; Thompkins again said "yes." Finally, the detective asked "Do you pray to God to forgive you for shooting that boy down?," to which Thompkins replied "yes." Thompkins refused to make a written confession, and the interview ended about 15 minutes later. The trial court refused to suppress that statement, and a jury convicted Thompkins of first-degree murder and other offenses. The Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied review. On federal habeas, the district court denied relief. The Sixth Circuit reversed, finding that the state court of appeals unreasonably applied *Miranda* when it found that Thompkins impliedly waived his right to remain silent by answering a few questions after nearly three hours of silence. The court also held that Thompkins' counsel was ineffective for failing to ask for a limiting instruction regarding the testimony of an accomplice. In an opinion by Justice Kennedy, the Court reversed.

The Court observed that there was no dispute that Thompkins was fully and accurately advised of his *Miranda* rights. The first disputed question was whether, as Thompkins asserted, "he 'invoke[d] his privilege' to remain silent by not saying anything for a sufficient period of time," thereby requiring the police to cease the interrogation. The Court held he did not, adopting the rule that "an accused who wants to invoke his or her right to remain silent [must] do so unambig-uously." The Court had adopted a similar rule with respect to assertions of the right to counsel in *Davis v. United States*, 512 U.S. 452 (1994), and it now held that *Davis*' reasoning applies in the right-to-remain-silent context. The Court observed that this rule makes clear to the police when they may, and may not, continue an interrogation; and it prevents the suppression of confessions when the police "guess wrong" about the suspect's desires.

The Court next addressed whether Thompkins waived his right to remain silent by responding to the detective's questions about God. The Court held that he did. The Court acknow-ledged that "[s]ome language in *Miranda* could be read to indicate that waivers are difficult to establish absent an explicit written waiver or a formal, express oral statement." But, the Court found, later decisions "have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief" (internal citation omitted). In particular, in *North Carolina v. Butler*, 441 U.S. 369 (1979), the Court held that a *Miranda* waiver can be implied from all the circumstances. And in *Colorado v. Connelly*, 479 U.S. 157 (1986), the

Court held that the govern-ment can meet its "heavy burden" by a preponderance of the evidence. Taking its precedents together, the Court held: "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." The Court found that standard met here. In so holding, the Court stated that the three hours it took to get to that point made no difference; "[p]olice are not required to rewarn suspects from time to time." Finally, the Court rejected Thompkins' contention that "the police were not allowed to question him until they obtained a waiver first." Such a rule cannot be reconciled with *Butler*, which held that *Miranda* waivers can be inferred. And such a rule would be bad policy because a suspect may wish to hear what the detectives have to say before deciding to maintain his silence or waive his right. The Court therefore held that the state court's decision rejecting Thompkins' *Miranda* claim was correct, and therefore necessarily reasonable under AEDPA. The Court then briefly turned to Thompkins' ineffective assistance of counsel claim, and reversed the Sixth Circuit's grant of habeas relief on that ground as well. Even if his counsel erred in not requesting a limiting instruction, he cannot show prejudice because there was copious evidence of Thompkins' guilt, and the jury was capable of assessing the accomplice's credibility without the limiting instruction.

Justice Sotomayor wrote a dissenting opinion, which Justices Stevens, Ginsburg, and Breyer joined. The dissent was sharply critical of the Court's "substantial retreat" from the protections of *Miranda*. In the dissent's view, *Miranda* and *Butler* clearly established that there is a presumption that a defendant does *not* waive his right to remain silent, and that the prosecution bears a "heavy burden" to show that he did. Under those decisions, "[m]ere silence" is not enough to establish waiver, and "the fact that a confession was in fact eventually obtained" does not rebut the presumption of non-waiver. The dissent also disagreed with the Court's ruling requiring suspects to "clearly invoke his right to silence by speaking." The dissent felt that *Davis*, which involved an assertion of the right to counsel following a prior waiver, did not logically apply to the invocation of the right to remain silent. "Advising a suspect that he has a 'right to remain silent' is unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected." The dissent expressed the fear that the net effect of the Court's decision is to "invite[] police to question a suspect at length . . . in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights."

Florida v. Powell, 08-1175. In a 7-2 decision, the Court held that the *Miranda* warnings at issue were adequate even though they did not explicitly reference the right to consult with an attorney during questioning. After his arrest, Tampa officers read respondent Kevin Dewayne Powell his *Miranda* warnings from a standard law enforcement form. These warnings advised, in part, that "[y]ou have the right to talk to a lawyer before answering any of our

questions" and "[y]ou have the right to use any of these rights at anytime you want during this interview." Powell acknowledged he understood his rights and gave an inculpatory statement to the officers. At trial, Powell moved to suppress his statement on the ground that the warnings "did not adequately convey his right to the presence of an attorney during questioning." The trial judge denied the motion. On appeal, the Florida Second District Court found the warnings inadequate. The Florida Supreme Court affirmed, finding that the warnings "suggested that Powell could 'only consult with an attorney before questioning'" and not during questioning. In an opinion by Justice Ginsburg, the Court reversed.

The Court first held that, under *Michigan v. Long*, 463 U.S. 1032 (1983), the Florida Supreme Court's decision did not rest on an adequate and independent state ground because that court did not clearly state that it was independently relying on the Florida Constitution. Turning to the merits, the Court held that the warnings were adequate. In doing so, the Court reaffirmed that no particular words are required as long as the warnings "reasonably convey" the *Miranda* rights, as the Court had previously held in both *California v. Prysock*, 453 U.S. 355 (1981), and *Duckwork v. Eagan*, 492 U.S. 195 (1989). Focusing on the particular right at issue here — "the right to consult with a lawyer and to have the lawyer with him during interrogation" — the Court found the warnings were adequate for two reasons. First, the "officers did not 'entirely omi[t]' . . . any information *Miranda* required them to impart." Second, when read together, "the two warnings" as set out above "reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times." The Court again declined to "dictate[]" the particular words required to inform a defendant of his *Miranda* rights. The Court concluded that, "[a]lthough the warnings were not the *clearest possible* formulation of *Miranda*'s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading."

Justice Stevens dissented, joined by Justice Breyer. Justice Stevens concluded that the warnings were inadequate because they wholly omitted the right to have counsel with the defendant during questioning. "The more natural reading of the warning," Justice Stevens wrote, was "that Powell only had the right to consult with an attorney before the interrogation began, not that he had the right to have an attorney with him during questioning." Justice Stevens reasoned that the "catchall clause" did not remedy the inadequate warning because it merely referred back to the prior warning that Powell only had the right to consult before questioning. And in a portion of the dissent not joined by Justice Breyer, Justice Stevens argued that the Court lacked jurisdiction because the Florida Supreme Court relied on state law, as well as federal law.

CRIMINAL LAW – CRIMINAL PROCEDURE

Graham v. Florida, 08-7412. By a 5-4 vote, the Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits a sentence of life without parole for juvenile non-homicide offenders. Petitioner Terrance Graham was 16 years old when he and three accomplices attempted to rob a Jacksonville barbecue restaurant. During the crime the restaurant manager was struck in the head by a metal bar. Graham was arrested, charged as an adult, and pled guilty to the charges, including armed burglary with assault or battery, a first-degree felony punishable by life. Following Graham's plea for a second chance, the trial judge withheld adjudication of guilt and sentenced Graham to three years of probation with 12 months to be served in the county jail. Six months after his release, Graham was again arrested. The state alleged that Graham participated in armed home invasion robberies in which two victims were assaulted and confined against their wills. A new trial judge determined that Graham violated his probation by committing home invasion robbery, possessing a firearm, and associating with persons engaged in a crime. The judge then found Graham guilty of, and sentenced him to the maximum allowable punishment for, each of his original crimes: life without parole for armed burglary with assault or battery and 15 years for attempted armed robbery. On appeal, the intermediate appellate court concluded that Graham's sentence did not violate the Eighth Amendment because it was not grossly disproportionate to his crimes. The Florida Supreme Court declined review. Through an opinion by Justice Kennedy, the Court reversed.

The Court began by setting out its Eighth Amendment frameworks, noting that the prohibit-tion on cruel and unusual punishments requires that punishments be proportionate with their crimes. Proportionality analyses, in turn, had fallen into two classes: (1) challenges to a term of years given the circumstances of the case; and (2) categorical restrictions on the imposition of the death penalty. Though Graham was not sentenced to death, the Court concluded that because he challenged an entire category of punishment — life without parole sentences for juveniles who commit non-homicide crimes — the categorical analysis was appropriate. Under that analysis, the Court first considers whether a national consensus against the sentence exists. The Court noted that 37 states permit sentences of life without parole for non-homicide juvenile offenders, but found that figure "incomplete and unavailing" in determining the national consensus. Rather, "an examination of actual sentencing practices in" those 37 states "discloses a consensus against its use." Relying on a recent study and its own review, the Court noted that 129 juveniles in just 12 jurisdictions are serving life without parole sentences for non-homicides. The Court concluded that, given the large number of violent or serious non-homicide felonies committed by juveniles, the small number of actual life without parole sentences revealed a consensus against it.

The second step of the categorical analysis is exercise of the Court's independent judgment. The Court noted that in *Roper v. Simmons*, 543 U.S. 551 (2005), it concluded that juveniles are less culpable than adults and therefore less deserving of the most severe punishment (the death penalty). And in a series of cases, including *Kennedy v. Louisiana*, 544 U.S. ___ (2009) (death penalty may not be imposed for the crime of raping a child), the Court established that an offender who does not commit homicide is categorically less deserving than murderers of the most serious punishments. Taken together, this establishes that the category of offender here — juveniles who commit non-homicides — has a "twice diminished" moral culpability. The Court then observed that life without parole is the second most serious punishment permitted, and that the permanent denial of the most basic liberties is an especially harsh sentence for a juvenile. In light of these considerations, the Court concluded that "none of the goals of penal sanctions that have been recognized as legitimate — retribution, deterrence, incapacitation, and rehabilitation — provides an adequate justification" for the sentence. The Court therefore held that, although "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

The Court rejected the two alternative approaches advocated by Florida and Chief Justice Roberts' concurring opinion. Florida had argued that state laws already take a juvenile offender's age into account when determining how a juvenile is charged. The Court held that this is insufficient: life sentences may still be imposed "based on a subjective judgment that the defendant's crimes demonstrate an irretrievably depraved character," an assessment that cannot be made accurately about juveniles. The Court also rejected Chief Justice Roberts' approach of case-by-case proportionality review that would require consideration of the offender's age. This method, the Court concluded, suffers from the same impossibility of accurate prediction of an offender's true character. In the end, held the Court, juvenile non-homicide offenders should not be denied the opportunity to achieve "maturity of judgment and self-recognition of human worth and potential." The Court closed by noting that its conclusion is supported, though not controlled, by the international community's unanimous rejection of life without parole sentences for non-homicide juvenile offenders.

Chief Justice Roberts wrote an opinion concurring in the judgment. He agreed that Graham's sentence violates the Eighth Amendment, but arrived at that conclusion by engaging in the gross disproportionality review used by the Court in previous non-capital cases. He concluded that, considering the age of the offender, the nature of the criminal conduct, and the severity of the punishment, an inference of gross disproportionality existed here. Graham's crime was not the most serious offense, a general presumption of diminished culpability for juvenile offenders was not rebutted by Graham's actions or characteristics, and the sentence

imposed was the most severe sanction for a non-homicide offense. Chief Justice Roberts also found that intra- and inter-jurisdictional comparisons of Graham's crime and sentence confirmed the gross disproportionality inference. He added that the Court's categorical rule was unnecessary and unwise because, unlike Graham's case, some juvenile crimes are so heinous and some juvenile offenders are so culpable that a sentence of life without parole would be entirely constitutional.

Justice Thomas dissented, joined by Justice Scalia and Justice Alito in part. The dissent criticized the majority's reliance on a "snapshot of American public opinion" and its own moral judgments as unprincipled foundations upon which to reject the authority of state legislatures, juries, and trial judges. And, the dissent stated, the majority committed additional error by expanding the reach of the categorical analysis to non-death penalty cases. This decision eviscerates the long-followed rule that "death is different," and leaves no reliable limiting principle on the Court's categorical analysis. Moreover, argued the dissent, Graham's argument should not succeed even applying the categorical analysis. First, he failed to carry the heavy burden imposed on him to show a national consensus opposing his sentence. Rather, the clear legislative consensus and trend favors the availability of life without parole sentences for non-homicide juvenile offenders. "That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that — rarely imposed. It is not proof that the punishment is one the Nation abhors." The dissent likewise criticized the Court's exercise of its independent judgment, finding that the Court simply mandated adoption of the penological theories it "deems best." At bottom, the Court simply decided that juveniles who do not commit murder are not sufficiently culpable to justify such harsh retribution. But, agued the dissent, the sociological studies do not show that is true "in *every* case"; judges and juries should be permitted to impose a life without parole sentence in the rare case where it is warranted. The dissent also disagreed with Chief Justice Roberts' concurrence. In the dissent's view, "the concurrence relies on the same type of subjective judgment as the Court, only it restrains itself to a case-by-case rather than a categorical ruling."

Samantar v. Yousuf, 08-1555. The Court unanimously held that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1330, 1602 *et seq*. — which provides that a "foreign state shall be immune from the jurisdiction" of federal and state courts if no statutory exception applies — does not apply to individual foreign government officers acting in their official capacities. Petitioner Mohamed Ali Samantar served in various high-ranking positions, including Prime Minister, in Somalia's government throughout the 1980s. He fled when the military regime in Somalia collapsed in 1991, and now resides in Virginia. Respondents, members of the Isaaq clan, brought suit against Samantar, claiming that they were subjected to systematic persecution by the military regime under Samantar's control. He filed a motion to dismiss, asserting that suit was barred by sovereign immunity. The district court granted the motion.

The Fourth Circuit reversed, holding that the language and structure of the FSIA indicated that its provisions do not apply to individual foreign government agents. In an opinion by Justice Stevens, the Court affirmed.

The Court noted that the FSIA was the codification of the Department of State's "restrictive theory" of foreign sovereign immunity, which confined immunity to those suits involving foreign sovereigns' public, and not commercial, acts. The question for the Court was whether the FSIA's text, which clearly provides immunity for a foreign state, extends to individuals. The definition of "foreign state" in §1603(a) includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." While conceding that this definition is broader than just the governing body politic, the Court concluded that it nevertheless excludes individuals. In particular, the Court pointed to the definition of "agency or instrumentality" in §1603(b): its opening clause speaks of an "entity," and none of the its three subsections comfortably encompasses individuals. Additionally, elsewhere in the FSIA, where Congress wished to include officials' acts as equivalent to those of a foreign state it expressly did so.

The Court also found that nothing in the statute's history and purpose suggested that the FSIA was meant to codify the common law with respect to individual foreign official immunity. Individual immunity was distinct from foreign-state immunity at common law, and the Court refused to read individual immunity into the FSIA without an express intention in the statutory text. The Court noted that legislative history supported the Court's conclusion that individual official immunity was purposely excluded from the FSIA's scope. The Court remanded the case to the district court to consider whether common-law individual-foreign-official immunity may still apply, as well as other valid defenses. Justices Scalia, Thomas, and Alito all wrote brief concurring opinions which contended that the majority's reliance on legislative history served no purpose, given the proper and thorough textual analysis that supported its judgment.

Padilla v. Kentucky, 08-1402. The Court held that counsel provides constitutionally deficient representation under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), if she fails to advise her noncitizen client whether a plea of guilty carries the risk of deportation. Petitioner Jose Padilla, a native of Honduras, lived in the United States as a lawful permanent resident for more than 40 years. Before he entered a plea of guilty to drug distribution in a Kentucky court, his defense attorney allegedly advised him that he "did not have to worry about his immigration status" because he had been in the United States for so long. This advice was incorrect; Padilla's deportation was "virtually mandatory" as a result of the guilty plea. Padilla brought a postconviction challenge alleging that he received ineffective assistance of counsel, and that he would not have entered the plea had he known of the

immigration consequences of his plea. The Kentucky Supreme Court rejected his claim, holding that the effects of Padilla's plea on his immigration status was "collateral" to the criminal matter, and that Padilla's trial attorney was therefore not constitutionally ineffective in his representation. In an opinion by Justice Stevens, the Court reversed.

The Court observed that the "landscape of federal immigration law has changed dramatically over the past 90 years." Whereas only few offenses used to require deportation, and judges had discretion not to impose that sanction, more recent laws make myriad offenses grounds for mandatory deportation and removed the equitable power of courts and the Attorney General to cancel that consequence. Accordingly, held the Court, "deportation is an integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty." With that background, the Court turned to the requirements of effective counsel when a defendant pleads guilty. The Court noted that it "ha[s] never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." It then concluded that "[w]hether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." Without determining whether immigration consequences are "direct" or "collateral," the Court held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim."

Pointing to bar association standards, the Court stated that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." Specifically, the Court held when the removal consequences are "succinct, clear, and explicit" under immigration law, an attorney must advise the defendant of those consequences. When the consequences are "unclear or uncertain," the defense attorney must advise her client that the plea "may carry a risk of adverse immigration consequences." The Court declined the United States' suggestion that *Strickland* applies in this context "only to the extent [the defendant] has alleged affirmative misadvice." The Court reasoned that "there is no relevant distinction between an act of commission and an act of omission in this context," that counsel should not be given an incentive to be silent about immigration consequences, and that the United States' rule would "deny a class of clients least able to represent themselves the most rudimentary advice on deportation." The Court reversed and remanded for the lower courts to determine whether Padilla was prejudiced by the ineffective assistance of counsel.

In a concurrence, Justice Alito, joined by Chief Justice Roberts, pointed out that immigration law is "never simple" and was a specialty distinct from criminal defense. For this reason, it is difficult for defense lawyers to determine when immigration consequences are "succinct, clear, and explicit." The concurring Justices agreed that the "affirmative misadvice" of Padilla's counsel constituted ineffective assistance of counsel, but would require only that

defense counsel advise a noncitizen client that a conviction may have adverse immigration consequences and that he or she should consult with an immigration specialist. Justice Scalia authored a dissent, joined by Justice Thomas. The dissent believed that immigration was collateral to the criminal proceeding, and that "[a]dding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping point." The dissent recognized that "misadvice" conceivably could affect the voluntariness of the plea, but asserted that such a claim was properly a Due Process challenge, not a Sixth Amendment challenge. In the dissent's view, requiring advice on specific matters could be dealt with properly by rule and/or statute, and should not become a constitutional matter.

CRIMINAL LAW – CAPITAL/HABEAS

McDaniel v. Brown, 08-559. The Court unanimously held that the Ninth Circuit erred when it granted habeas relief on sufficiency-of-the-evidence grounds. Respondent Troy Brown was convicted of the rape of a nine-year-old child. Brown and his two brothers all lived in the same trailer park as the victim, who was raped in a dark bedroom and could not identify the attacker. She failed to identify Brown either from a photo lineup or at trial. Evidence showed, however, that Brown left a bar that night in time to murder the victim; that her description of the assailant's clothing matched what Brown wore that night; that her description of the assailant as smelling of beer and vomit matched Brown's conduct that night; and that he returned to his trailer home with enough time to have raped her. On the other hand, some evidence bolstered the defense's theory that one of Brown's brothers committed the crime. At trial, the state also introduced DNA evidence. The state's DNA expert testified that DNA from the semen recovered from the victim's underwear matched to Brown, and that there "was only [a] 1 in 3,000,000" probability another person from the general population would share the profile. The jury convicted and the state court upheld the conviction on direct appeal. Brown filed a state collateral challenge to the conviction and argued that counsel was "ineffective for failing to object to the admission of the DNA evidence." The state courts denied relief. In his federal habeas action, Brown argued that the evidence was insufficient because the testimony from the state's DNA expert "was inaccurate and unreliable" as to its probabilities references, both with respect to the general population and with respect to his brothers. The district court accepted a new DNA report from Brown's expert (the Mueller Report), and "supplemented" the record. Then, based on that report, the court found the testimony from the state's DNA expert "unreliable," and granted relief on the sufficiency-of-the-evidence claim and on an ineffective-assistance-of-counsel claim. The Ninth Circuit affirmed on the former ground. Through a *per curiam* opinion, the Court reversed.

The Court first noted that, in briefing the issue, the parties now agree that the district court and Ninth Circuit erred in their application of *Jackson v. Virginia*, 443 U.S. 307 (1979). A

Jackson claim authorizes a habeas court to grant relief if the judge finds that "upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Accordingly, the lower courts erred in (1) admitting the Mueller Report for purposes of evaluating Brown's *Jackson* claim, and (2) excluding the DNA evidence the state introduced at trial for purposes of evaluating the *Jackson* claim. Stated the Court, "a reviewing court must consider all of the evidence admitted at trial when considering a *Jackson* claim." The Court went on to hold that, even assuming the Ninth Circuit properly considered the Mueller Report, "the court made an egregious error in concluding the Nevada Supreme Court's rejection of respondent's insufficiency-of-the-evidence claim 'involved an unreasonable application of . . . clearly established Federal law.'" The Court noted that the new report "did not contest that the DNA evidence matched" Brown, only that it "overstated its probative value by failing to dispel the prosecutor's fallacy," which "is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." The DNA evidence still provided "powerful inculpatory evidence." Even the Mueller Report shows that the probability that Troy Brown, not his brother Trent, committed the crime is 131/132 — which a rational jury could consider "to be powerful evidence of guilt." The Court also criticized the Ninth Circuit for "depart[ing] from the deferential review that *Jackson* and §2254(d)(1) demand." For example, the court of appeals failed to "review the evidence in the light most favorable to the prosecution," and instead highlighted and depended upon "inconsistencies in the testimony." Justice Thomas wrote a concurring opinion in which Justice Scalia joined, disagreeing with the Court's decision to say anything more than that the Ninth Circuit erred by not basing its *Jackson* review solely on the evidence presented at trial.

Smith v. Spisak, 08-724. Without dissent, the Court reversed a Sixth Circuit decision that had granted habeas relief to respondent, a death-sentenced Ohio inmate, on two grounds: (1) that the penalty phase instructions and verdict forms violated *Mills v. Maryland*, 486 U.S. 668 (1988), by requiring the jury to consider as mitigating only those facts unanimously found to be mitigating; and (2) that defense counsel rendered ineffective assistance of counsel in delivering the penalty-phase closing argument. Respondent Frank Spisak was convicted in 1983 of three murders and two attempted murders at Cleveland State University. He testified at trial and admitted to the crimes, stating that he committed them "because he was a follower of Adolf Hitler" and in advancement of his own "war" for the Aryan people. He testified that he intended to "create terror" at the university because the university was a place where Jewish people "and the system" were "brainwashing the youth." He recited the details of selecting his victims, by race or by their perceived Jewish background, and expressed regret for having killed a professor he wrongly thought to be Jewish. He expressed a desire to continue his "war" if given the opportunity; and he expressed pride in his crimes and his ability, initially, to elude capture as it allowed him to continue to kill. Though Spisak's initial defense was insanity, his experts could not opine that he was insane at the time of the crime. The experts did testify,

however, in the penalty phase that he suffered from a mental illness. The jury recommended, and the judge imposed, a sentence of death. The state courts denied relief on direct appeal and collateral review. Spisak filed a federal habeas action. The district court rejected his claims, but the Sixth Circuit reversed based on the purported violation of *Mills* and ineffective assistance of counsel during the sentencing phase. In an opinion by Justice Breyer, the Court reversed.

The Court first addressed the *Mills* claim, and observed that the deficient instructions in *Mills* repeatedly advised the jury that it must unanimously determine each mitigating circumstance. Here, by contrast, the trial judge instructed the jury, and the verdict forms reflected, that it could consider *any* factor in mitigation. The instructions and forms also stated that the jury must unanimously find that the state proved, beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating factors. No instruction, however, advised the jury it must unanimously find the existence of mitigating factors. Therefore, held the Court, the state court decision under review did not violate clearly established federal law, as required for a grant of habeas relief under AEDPA. The Court also rejected a second ground for error in the instructions that the Sixth Circuit relied upon, namely, that the instructions erroneously required unanimous rejection of the death sentence before consideration of any alternatives. The Court stated that none of its precedents addressed that purported error, and, consequently, there could be no violation of clearly established federal law to afford relief.

The Court next turned to counsel's closing argument in the penalty phase. The Court noted that counsel's argument "described Spisak's killings in some detail," discussed Spisak's "admiration" of Hitler as motivating the crimes, characterized his client, at various times, as "sick," "twisted," and "demented," and acknowledged he would not change. The Court further noted, however, that defense counsel also argued that all the experts agreed that Spisak was mentally ill, to some extent, and that fact should allow for a sentence of less then death. Counsel also appealed to the jurors' humanity, and requested they consider the evidence "fairly" and adhere to their oath to "uphold the law." Spisak submitted that the argument was deficient because counsel "overly emphasized the gruesome nature of the killing" and his expressed intent and desire to continue killing, while failing sufficiently to state the facts supporting mental illness or other mitigation evidence. Spisak also complained that counsel failed to make an "explicit request that the jury return a verdict against death." The Court held that, assuming, without deciding, the inadequacy of the argument, there was no "reasonable probability that the result would have been different." The Court noted that the sentencing phase followed immediately after the guilt phase. Thus, the jurors had "fresh in their minds" not only the photographs of the victims' bodies and Spisak's own "boastful and unrepentant confessions and his threats to commit further acts of violence," but also the expert testimony on mental illness. Moreover, the Court found, counsel appealed to the jurors' humanity multiple times. The Court concluded that, in light of this record, there could be "no 'reasonable

probability' that a better closing argument without these [complained of] defects would have made a significant difference." In other words, respondent failed to show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984); the Ohio Supreme Court's rejection of his ineffective-assistance claim was not unreasonable.

Justice Stevens wrote a concurring opinion, in which he agreed with the Sixth Circuit that both errors occurred, but reasoned that neither error prejudiced respondent. In particular, Justice Stevens asserted that the instructions were unconstitutional under *Beck v. Alabama*, 447 U.S. 625 (1980), because they required the jury unanimously to reject the death sentence before considering any lesser sentence. In his view, the instructions here presented "the jury the same false choice that our holding in *Beck* prohibits," *i.e.*, choosing between a death sentence or acquittal, an all-or-nothing dilemma. As to the closing argument, Justice Stevens reasoned that "a strategy can be executed so poorly as to render even the most reasonable of trial tactics constitutionally deficient," and found that such poor execution was evident in the instant case. Even so, "[n]ot withstanding these two serious errors," Spisak was not entitled to relief because he could not show prejudice: "Spisak's own conduct alienated and ostracized the jury, and his crimes were monstrous."

Beard v. Kindler, 08-992. By an 8-0 vote, the Court held "that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." Under the adequate-state-grounds doctrine, a federal habeas court cannot review a claim that was barred by an adequate and independent state procedure. In this case, respondent Joseph Kindler was convicted of murder in 1984, and the jury recommended that he be sentenced to death. Before the trial court could consider the jury's recommendation or act on Kindler's post-trial motions, Kindler broke out of prison. The trial court therefore dismissed his post-trial motions. Kindler was later captured in Canada, where he escaped again and was eventually recaptured. He fought extradition until 1991. Upon his return to the United States in 1991, the trial court denied his motion to reinstate his challenges to his conviction and sentence, and formally imposed the death sentence. On direct review, the Pennsylvania Supreme Court affirmed based on its conclusion that the trial court reasonably exercised its discretion under the state's "fugitive forfeiture" rule. On state habeas, the trial court rejected Kindler's claims because they had already been found to be forfeited. The Pennsylvania Supreme Court affirmed. Kindler then sought federal habeas relief. The district court concluded that the fugitive forfeiture rule was inadequate to bar habeas review, and held that Kindler's death sentence was unconstitutional. The Third Circuit affirmed (though it found the sentence unconstitutional partly for different reasons). The court stated that "[a] procedural rule that is consistently applied in the vast majority of cases is adequate to bar federal habeas review even if state courts are willing to occasionally overlook it and review the merits of a claim for relief where the rule would otherwise apply." Turning to the fugitive forfeiture rule at issue, the court

continued: "Pennsylvania courts had discretion to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. . . . Accordingly, the fugitive forfeiture rule was not 'firmly established' and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petition in federal court." In an opinion by Chief Justice Roberts, the Court vacated and remanded.

The question presented to the Court was "whether discretionary procedural rulings are automatically inadequate to bar federal court review on habeas." The Court's answer was no. "Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine. To the contrary, a discretionary rule can be 'firmly established' and 'regularly followed' — even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." The Court noted that any other ruling would "pose an unnecessary dilemma for the States: States could preserve flexibility by granting courts discretion to excuse procedural errors, but only at the cost of undermining the finality of state court judgments. Or States could preserve the finality of their judgments by withholding such discretion, but only at the cost of precluding any flexibility in applying the rules." And it would be "unfortunate" to push states to adopt inflexible rules because rigid adherence to procedural bars "would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result" (internal quotation marks and citation omitted). The Court also noted that, in light of the principles of federalism and comity underlying the adequate-state-grounds doctrine, "it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts."

The Court declined Pennsylvania's request that it adopt a new standard for assessing the adequacy of state rules, and left to the Third Circuit to address Kindler's contention that Pennsyl-vania courts applied a new rule mandating dismissal that was inadequate because it broke from past practice. Justice Kennedy filed a concurring opinion, which Justice Thomas joined, expressing his view that the doctrine should not "prevent a State from adopting, and enforcing, a sensible rule that the escaped felon forfeits any pending postverdict motions." He observed that the two purposes of the doctrine are protecting litigants' reliance interests and ensuring that state courts do not evade compliance with a federal standard. Neither concern applies here, he concluded, "even if the principles barring the postverdict motions are first elaborated in the instant case."

Wood v. Allen, 08-9156. The Court, by a 7-2 vote, held that the Alabama Court of Criminal Appeals did not make an unreasonable determination of facts within the meaning of 28 U.S.C. §2254(d)(2) when it held that petitioner's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies during the sentencing phase of his capital

trial. Petitioner Holly Wood was convicted of breaking into his ex-girlfriend's home and shooting her in the head and face. He was sentenced to death. The state courts affirmed the conviction and sentence on direct appeal. In state collateral proceedings, Wood contended that he was mentally retarded, and that trial counsel was ineffective in failing to investigate and present evidence of that. After holding three evidentiary hearings, the state court found that the evidence did not support the claim of mental retardation. The court also found that trial counsel had made a strategic decision to end investigation into Wood's mental status after a review of an expert's mental evaluation report (the Kirkland Report). The court found that counsel concluded that nothing in the report merited further investigation, and that counsel feared that calling Kirkland to the stand would lead to the admission of unfavorable facts. On federal habeas review, the district court granted relief on the claim that counsel erred in failing to investigate and present evidence of mental deficiency. The court specifically rejected the state court finding that the decision had been strategic, pointed to evidence that one of petitioner's three attorneys had made failed attempts to gather school records, "could not recall speaking to any of Wood's teachers," and advised the trial judge that he would request further psychological evaluation" before sentencing by the judge, though the evidence would come too late to be presented to the jury. The Eleventh Circuit reversed, finding that the state court factual findings must be afforded deference under 28 U.S.C. §§2254(d)(2) and (e)(1). The court concluded that Wood had "not presented evidence, much less clear and convincing evidence, that counsel" had not made a strategic decision. In an opinion by Justice Sotomayor, the Court affirmed.

The Court stated that it had granted review to resolve "whether in order to satisfy §2254(d)(2), a petitioner must establish only that the state-court factual determination was 'unreasonable,' or whether §2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence." The Court found, however, that it did not need to resolve the issue in order to resolve this case because Wood's claim fails even under the less deferential standard set out in §2254(d)(2). The Court concluded that "the state court's finding that Wood's counsel made a strategic decision not to pursue or present evidence of Wood's mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings." The Court found that "the evidence in the state-court record demonstrated that all of Wood's counsel read the Kirkland report" and that one of the attorneys, Mr. Dozier, had determined that no further investigation was necessary. Further, another attorney, Mr. Trotter, advised the trial judge that the expert's report would not be introduced for the jury to review. The Court found such evidence "can be fairly read to support" the state court determination that the decision was strategic. The Court added that, although there may be some evidence "that may plausibly be read as inconsistent with" finding the decision was strategic, that alone "does not suffice to demonstrate that the finding was unreasonable." The Court also found that the

question whether the strategic decision itself was reasonable was a different question, and one not "fairly included" in Wood's question presented.

Justice Stevens dissented, joined by Justice Kennedy. Justice Stevens reasoned that the record may well support a decision not to pursue the evidence, but that does not necessarily show a *strategic* decision, *i.e.*, "a conscious choice between two legitimate and rational alternatives." Justice Stevens, relying heavily on the duty to investigate until counsel may make "a reasoned conclusion that further investigation is futile," stated that the state court decision was unreasonable, for "there is no evidence in the record to suggest that Wood's counsel reached such a conclusion." Justice Stevens concluded that the record demonstrated that "the failure to investigate was the product of inattention and neglect by attorneys preoccupied with other concerns and not the product of a deliberate choice between two permissible alternatives."

Jefferson v. Upton, 09-8852. By a 7-2 vote, the Court summarily reversed an Eleventh Circuit decision that had rejected petitioner's claim on habeas that his lawyers were constitutionally inadequate because they failed to investigate, for capital sentencing purposes, a traumatic head injury he suffered as a child. A post-conviction evaluation of Lawrence Joseph Jefferson showed that he suffers from organic brain damage due to a childhood accident, resulting in "severe cognitive disabilities," poor impulse control, and other impairments that, Jefferson averred, should have been considered by the jury that sentenced him to death. In his state post-conviction proceeding, Jefferson's trial attorneys testified that they did not pursue the neuropsychological evaluation because they believed, based on the report of a psychiatrist, that such a review would be a "waste of time." The psychiatrist disputed that characterization of his opinion. After the state court took testimony on Jefferson's post-conviction petition, the judge contacted the prosecutor *ex parte* and "asked the State's attorneys to draft the opinion of the court." Jefferson contended that he was not advised of these communications, although his attorneys did receive a copy of the draft opinion. The state court adopted verbatim the state's draft, which referred to testimony by a trial attorney who, in fact, did not testify. The state court's opinion concluded that the decision of the trial attorneys not to seek the evaluation was "reasonable." The Georgia Supreme Court affirmed. Jefferson filed a federal habeas petition, and the district court ruled in his favor. The court accepted the state court's findings of fact, but held that Jefferson had still established ineffective assistance of counsel. A divided panel of the Eleventh Circuit reversed. The court held that the state court's findings were "entitled to a presumption of correctness" that it was "duty-bound to apply." Through a *per curiam* opinion, the Court reversed.

The Court held that the Eleventh Circuit erred in the reasoning it used for accepting as correct the factual findings of the state court. Jefferson filed his federal habeas petition before

AEDPA's enactment. Prior to AEDPA, the habeas statute set forth eight exceptions to the presumption of correctness otherwise afforded to a state court's findings of fact in a federal habeas proceeding. Former 28 U.S.C. §2254(d)(1)-(8). The Court found that Jefferson had long argued that the process by which the state court found its facts — adopting verbatim the state's draft, which it solicited *ex parte* — was deficient. That contention, the Court found, implicates at least three subsections of §2254(d): (d)(2), (d)(6), and (d)(7), which look to whether the state court's "factfinding procedure," "hearing," and "proceeding" were not "full, fair, and adequate." The Court held that the Eleventh Circuit erred by considering only §2254(d)(8), which lifts the presumption of correctness for findings that are "not fairly supported by the record." In sum, by "treating §2254(d)(8) as the *exclusive* statutory exception, and by failing to address Jefferson's argument that the state court's *procedures* deprived its findings of deference, the [Eleventh Circuit] applied the statute and our precedents incorrectly." The Court declined to decide in the first instance whether any of the other exceptions set out in §2254(d) apply here. Rather, the Court remanded so that the lower courts could do that. In the course of its opinion, the Court reiterated that it has criticized a court's "verbatim adoption of findings of fact prepared by prevailing parties," and that it has "not considered the lawfulness of . . . the use of such practice where (1) a judge solicits the proposed findings *ex parte*, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them."

Justice Scalia filed a dissenting opinion that Justice Thomas joined. The dissent argued that Jefferson had not, at any stage of the federal proceedings, claimed that the state court's factual findings should not be accepted as correct, nor had he ever asked the federal courts to apply one of the §2254(d)(1)-(7) exceptions and make its own factual determinations. "The Court's opinion . . . is the first anyone (including Jefferson) has heard of this argument." Rather, Jefferson merely argued that, accepting the state court's factfinding, his counsel was ineffective under *Strickland v. Washington*. The dissent complained that the decision here continues the Court's "increasingly unprincipled GVR practice," and characterized the decision as a "Summary Remand to Ponder a Point Neither Raised Here nor Below (SRPPRNHB)."

CRIMINAL LAW – FEDERAL STATUTES & RULES

Johnson v. United States, 08-6925. The Armed Career Criminal Act imposes a 15-year mandatory minimum sentence upon felons who unlawfully possess a firearm and have three or more prior convictions for a "violent felony," a term defined to include any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §924(e)(2)(B)(i). By a 7-2 vote, the Court held that a prior Florida

conviction for simple battery is not a "violent felony" under that provision. Petitioner Curtis Darnell Johnson pleaded guilty to "knowingly possessing ammunition after having been convicted of a felony." Johnson's federal sentence was enhanced under §924(e) based in part on a prior Florida state conviction for battery. Florida law allows either an "intentional[] touch[] or strik[e]" or "intentional" infliction of "bodily harm" to support a conviction for battery. The records failed to establish whether the conduct supporting the prior conviction was a mere touch or actual bodily injury. The Eleventh Circuit affirmed the enhancement. In an opinion authored by Justice Scalia, the Court reversed.

The Court found that, although §924(e) does not define "physical force," general definitions of "physical force" would "suggest a degree of power that would not be satisfied by the merest touching." The Court acknowledged a "specialized legal usage of the word 'force'" in common law battery, which includes "even the slightest offensive touching." The Court concluded, however, that Congress did not intend to incorporate that common-law definition of battery. "Here we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies].'" And "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force — that is, force capable of causing physical pain or injury to another person." Finally, the Court rejected the Government's contention that construing §924(e) "to require violent force will undermine its ability to enforce the firearm disability" for persons convicted of a "misdemeanor crime of domestic violence" and its ability to remove aliens convicted of a "crime of domestic violence." The Court reasoned that the former statute is distinguishable, and the latter statute can be applied through the "modified categorical approach," which allows courts to consult the trial record to determine whether the prior conviction fits within the statutory phrase.

Justice Alito authored a dissent in which Justice Thomas joined. Justice Alito asserted that the statute should be read to "incorporate" the "traditional definition" of battery, which would include mere touching. He cited to the proposition that, "[w]hen Congress selects statutory language with a well-known common-law meaning, we generally presume that Cognress intended to adopt that meaning. . . . And here, I see nothing to suggest that Congress meant the phrase 'use of physical force' in ACCA to depart from that phrase's meaning at common law."

Bloate v. United States, 08-728. In a 7-2 decision, the Court held that a defendant's request for "pretrial motion preparation time" is not automatically excluded from the 70-day period in which a federal defendant must be tried after indictment or initial appearance (whichever is later) under the Speedy Trial Act, 18 U.S.C. §3161. Subsection 3161(h)(1) provides an automatic exclusion from the 70-day period for a "period of delay resulting from other proceedings concerning the defendant, including but not limited to" certain specific situations. One of them, set out in subparagraph (h)(1)(D), is "delay resulting from any pretrial motion,

from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Subsection (h)(7), by contrast, allows a trial court to exclude a delay only when the court finds that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." At issue here was whether "pretrial motion preparation time" was covered by (h)(1)(D), and therefore automatically excludable, or instead was subject to (h)(7), and therefore excludable only if the court makes the required findings.

On August 24, 2006, a federal grand jury indicted petitioner Taylor James Bloate on a weapons charge and a drug charge. He was arraigned on September 1, 2006. The Magistrate entered a scheduling order that provided in part that pretrial motions were due by September 13, 2006. On September 7, 2006, petitioner requested a continuance, which the Magistrate granted by ordering pretrial motions due September 25, 2006. On September 25th, petitioner filed a waiver of such motions. The Magistrate held a hearing on October 4, 2006, and accepted the waiver. Various other delays occurred but are not at issue. On February 19, 2007, petitioner moved to dismiss his charges claiming a violation of §3161. In calculating the lapsed time, the district court excluded September 7 through October 4 — the period from petitioner's continuance request through the hearing on his waiver. The court proceeded to deny the motion, and petitioner was eventually convicted of both charges. On appeal to the Eight Circuit, petitioner again claimed a violation of §3161. The Eight Circuit rejected the argument, finding that the district judge properly concluded that the September 7 through October 4 period was automatically excluded under subsection (h)(1). In an opinion by Justice Thomas, the Court reversed.

Following the well-established rule that a specific provision trumps a general provision, the Court ruled that subparagraph (h)(1)(D) would control in the matter of pretrial motions. But, the Court, observed, "[s]ubparagraph (D) does not subject all pretrial motion-related delay to automatic exclusion. Instead, it renders automatically excludable only the delay that occurs '*from the filing* of the motion through the conclusion of the hearing on, or other prompt disposition of' the motion." This shows that Congress intended delays arising from motions to be automatically excluded "*only* from the time a motion is filed." By contrast, noted the Court, other subparagraphs of (h)(1) "define the boundaries of an enumerated exclusion broadly when so desired." The Court then rejected various arguments put forth by the Government and the dissent for a contrary interpretation of subsection (h)(1): (h)(1)'s use of the phrase "including, but not limited to" does not affect the "conclusion that a delay that falls *within* the category of delay addressed by subparagraph (D) is governed by the limits in that subparagraph"; and there is not sufficient ambiguity to justify disregarding those limits. The Court added that its Speedy Trial Act decisions explain "that the Act serves not only to protect defendants, but also to vindicate the pubic interest in the swift administration of justice." Finally, the Court disagreed

that its interpretation would "'trap' district courts for accommodating a defendant's request for additional time to prepare pretrial motions." All a trial judge has to do is place its reasons for granting such a request in the record under subparagraph (h)(7). Moreover, if a district court fails to make the findings required by (h)(7) it "may dismiss the charges *without prejudice*, thus allowing the Government to refile charges or reindict the defendant."

Justice Ginsburg authored a concurring opinion, joining the majority "on the understanding that nothing in the opinion bars the Eighth Circuit from considering, on remand, the Government's argument that the indictment, and convictions under it, remain effective." In particular, Justice Ginsburg noted the Government's argument that petitioner's waiver motion filed on September 25, 2006 — after the request and grant of the continuance — stopped the time counted against the Government. Finding the argument was not properly before the Court, Justice Ginsburg reasoned that it could be considered in the Eighth Circuit on remand. Justice Alito authored a dissent, in which Justice Breyer joined. Relying on the inclusion of the phrase "including but not limited to" in (h)(1), Justice Alito rejected the Court's determination that subparagraph (h)(1)(D) "narrows the meaning of subsection (h)(1)." He concluded that "delay resulting from the granting of a defense request for an extension of time to complete pretrial motions falls comfortably within the terms of subsection (h)(1)," which cover "[a]ny period of delay resulting from other proceedings concerning the defendant . . . ."

Barber v. Thomas, 09-5201. By a 6-3 vote, the Court upheld the method by which the Federal Bureau of Prisons (BOP) calculates the credits received by federal inmates for good conduct. Federal law provides up to 54 days of credit "at the end of each year of the prisoner's term of imprisonment" if BOP determines "that, during that year, the prisoner" behaved well. Credit "for the last year or portion of a year of the term of imprisonment [is] prorated." 18 U.S.C. §3624(b)(1). The Bureau applies the 54 days based on the years a prisoner actually serves. Petitioner Michael Barber and other inmates contended that the proper, simpler, and more straightforward application of the statute would be to simply multiply 54 days by the number of years the prisoner was sentenced by the judge. The calculation urged by the inmates would result in accruing an average of seven more days' good time credits for every year spent in prison. The district court and Ninth Circuit upheld the BOP's calculation method. In an opinion by Justice Breyer, the Court affirmed.

To demonstrate the competing calculation methods, the Court walked through how they would apply to a prisoner who was sentenced to 10 years' imprisonment and behaved in an exemplary manner throughout. Barber's suggested approach would result in 540 days of good time credits: 54 days x 10. The BOP's approach would work as follows. At the end of an inmate's first year of incarceration, the BOP awards him 54 days of "good time credits." Those credits are recorded, and at the end of the second year another 54 days of credit are added to

it, totaling 108 credited days after two years. And so on. By the end of Year 8, the prisoner would have earned 432 days of good time credits (54 x 8). That wipes out the entire final year of his 10-year sentence, and shortens his ninth year to only 298 days. The inmate then earns an additional 38 days of credit during that ninth and final year (38 days being the prorated amount to which he is entitled based on a 54/365 ratio). In the end, an inmate sentenced to 10 years' incarceration would earn 470 days of good time credit, or roughly 15% of the prison time actually served.

The Court concluded that the BOP's method is lawful. First, §3624(b)(1) states that good time credits are to be applied "at the end of each year," based on an evaluation of the inmate's behavior "during that year," and prorated "within the last six weeks of the sentence." The BOP's method is consistent with that language because it looks at years the prisoner is actually serving. By contrast, the method urged by the inmates would give good time credits for years that the inmate never served (*e.g.*, Year 10), and would be calculated at the start of a prison sentence, not at the end of each year. The Court noted that a prior version of the statute had, indeed, granted the good time credits at the start of a sentence, but that statute had been replaced in 1984 by the current language. The Court also found that the BOP's interpretation was more consistent with the purpose of the 1984 revision, which the Court characterized as "honesty in sentencing." The revisions largely eliminated parole and any other method of shortening a federal sentence, leaving good time credits as the only means of reducing the time spent incarcerated. By limiting the application of good time credits to years actually spent in prison, the BOP's method "ties the award of good time credits directly to good behavior during the preceding year of imprisonment." The inmates' reading, by contrast, "loosens the statute's connection between good behavior and the award of good time and transforms the nature of the exception to the basic sentence-imposed-is-sentence-served rule."

The Court rejected the inmates' claim that the statute's use of the phrase "term of imprisonment" meant that good time credits were to be based upon the sentence imposed. The Court found that the phrase "term of imprisonment" means both "sentence imposed" and "sentence served," depending on the context of its usage within the statute. The Court further rejected claims that the legislative history of the statute favored the inmates' reading of the law, finding that the history was ambiguous at best. The Court also declined to apply the "rule of lenity" to adopt the reading urged by the inmates because the statute is not sufficiently ambiguous to justify invocation of that rule. Lastly, the Court rejected the dissent's alternative approach, which "was not raised by either party nor, to [the Court's] knowledge, used elsewhere in the Criminal Code." The Court found that the dissenters' approach required a conflicting and unworkable definition of "term of imprisonment," created a system even more complicated than the one employed by the BOP, applied credits at a different rate for different

years, and "vests" an inmate's interest in good time credits as soon as they are applied, rather than at the end of the term of imprisonment, as required by the statute.

Justice Kennedy filed a dissenting opinion, which Justices Stevens and Ginsburg joined. The dissent would hold that the phrase "term of imprisonment" means "the span of time that a prisoner must account for in order to obtain release." This span consists of both time actually served and good time credits. Each year of a term of imprisonment would also consist of a combination of time served and good time credits — *i.e.*, 311 days served plus 54 days of credits. The dissent's approach would be to apply the good time credits at the end of a year to the year that had just passed, thus retroactively moving up the start of the next year by 54 days. Thus the start of each new year in prison would begin (assuming full good time credits were awarded) 54 days earlier than the start of the preceding year. This approach would give a model prisoner sentenced to 10 years' imprisonment 533 days of good time credits, merely seven fewer than under the inmates' proposed approach. The dissent argued that its calculation method would result in having but a single definition of the phrase "term of imprisonment," and would be consistent with the rule of lenity by resolving the ambiguity in favor of the inmates.

Carr v. United States, 08-1301. By a 6-3 vote, the Court held that the Sex Offender Registra-tion and Notification Act (SORNA), 18 U.S.C. §2250 — which significantly increased the penalties associated with sex offenders' failure to register with state and federal databases — does not apply to persons whose underlying offense and travel in interstate commerce predated its enactment. The Act makes it a crime for a person who is required to register as a sex offender and who "travels in interstate or foreign commerce" to fail to update his (or her) registration upon traveling to a different state. In May 2004, petitioner Thomas Carr pleaded guilty in Alabama state court to first-degree sexual assault. He was released on probation a month later, and registered as a sex offender as required by Alabama law. Carr moved from Alabama to Indiana in late 2004 or early 2005, and did not re-register in Indiana. Congress enacted SORNA in 2006. The following year, federal prosecutors charged Carr with violating SORNA. Carr argued both that the statute, on its face, does not apply to people who traveled to other states prior to its effective date, and that if it did the law violated the *Ex Post Facto* Clause of the Constitution. The district court rejected his arguments, as did the Seventh Circuit. In an opinion by Justice Sotomayor, the Court reversed, holding that the statute applies only to sex offenders whose interstate travel (unlike Carr's) occurred before SORNA's effective date.

SORNA sets forth three elements that must be satisfied for a defendant to violate the law: (1) he must be "required to register under [SORNA]," §2250(a)(1); (2) he must be convicted as a sex offender under federal, tribal, or territorial law *or* (if he is a sex offender under state law) "travel[] in interstate or foreign commerce," §2250(a)(2); and (3) he must

"knowingly fail to register or update a registration as required by [SORNA]," §2250(a)(3). All parties agreed that those elements apply sequentially, for otherwise a sex offender under state law could violate SORNA, and be subject to federal prosecution, even if he did not leave the state after being convicted. The United States and Carr differed on the trigger date. The United States argued that "the statute is triggered by a sex-offense conviction, which must be followed by interstate travel, and then a failure to register under SORNA" — only the last of which must occur after SORNA took effect. Carr, by contrast, argued "that the statutory sequence begins when a person becomes subject to SORNA's registration requirement. The person must then travel in interstate commerce and fail to register." These events necessarily must postdate SORNA's enactment. The Court concluded that "Carr's interpretation better accords with the statutory text."

The Court observed that the first element listed is that the defendant must be "required to register under [SORNA]." It is most "sensible to conclude that Congress meant the first precondition to §2250 liability to be the one it listed first." The Court further noted that the law (in setting out the second element) uses the present-tense form of the verb "travels." Congress would have used "has traveled" had it intended to require registration from people who already had traveled prior to the law's enactment. The Court dismissed the United States' argument that Congress intended the interstate travel requirement to give the statute as sweeping a jurisdictional reach as possible. There is nothing "anomal[ous]," the Court held, about leaving some state sex-offender enforcement to the states. Traditionally, the Court noted, enforcement of sex offender registration laws was a state matter, not a federal matter. Moreover, while a "general goal" of SORNA may have been to locate "missing" sex offenders (those required to register who could not be located by the states where they were convicted), the specific language of the statute must take precedence over the broader aim of the Act, which contains many other provisions besides §2250. Lastly, the majority noted that the legislative history does not conflict with its reading of the statute. In a two-paragraph concurrence, Justice Scalia wrote that he concurred with the majority except for its discussion of legislative history, which he felt was both irrelevant and unnecessary.

In dissent, Justice Alito, joined by Justices Thomas and Ginsburg, wrote that the use of present tense did not indicate an intent to apply the law only to post-enactment travel. The dissent noted that Congress' drafting-style manual directs that laws be written in the present tense, and that other provisions of SORNA, also written in the present tense, clearly apply to past conduct. The dissent would hold that the triggering act bringing one under the ambit of the law is not the travel, but rather the conviction for a qualifying offense, which may have occurred prior to SORNA. Read from the perspective of that date, the present-tense form of "travel" would also apply to pre-enactment (but post-conviction) travel. The dissent further argued that the Act delegated to the Attorney General the power to promulgate regulations

regarding the scope of SORNA, including the power to determine the applicability of the Act to people convicted prior to the law's enactment. Had Congress phrased the travel requirement in the past tense, as suggested by the majority, it would have necessarily meant that the law applied to people convicted before the law's passage, and that would have contradicted its intention to remain "neutral" on that issue and defer to the judgment of the Attorney General. Lastly, the dissent argued that the majority's interpretation "leads to a result that makes no sense," because it would leave those offenders who had moved to other states prior to SORNA's enactment — precisely the people the law was meant to account for — exempt from SORNA's requirements, provided they did not move again.

FIRST AMENDMENT

Salazar v. Buono, 08-472. By a 5-4 vote, but without a controlling rationale, the Court held that a district court erred when it enjoined the Government from implementing legislation directing it to transfer to a private entity (the Veterans of Foreign Wars) a parcel of property on which a cross has long stood as a memorial to soldiers who died in World War I. In 1934, members of the Veterans of Foreign Wars erected a "Latin cross" on federal land in the Mojave National Preserve. The cross was intended as a monument for the soldiers killed in World War I, although a plaque to that effect was lost over time. The cross — which was maintained and rebuilt on different occasions over the years — was also the focus of Easter services from its earliest inception. Respondent Frank Buono is a retired Park Service employee who brought suit in federal district court challenging the presence of the cross on federal land. In 2002, the court ruled that Buono, a regular visitor to the Mojave, had standing to bring the suit and that the presence of the cross violated the Establishment Clause. The court enjoined the federal government from continuing to display the monument. However, because Congress had passed a statute forbidding the expenditure of federal funds to remove the cross, the Park Service covered the monument with a plywood box while the litigation continued. The initial ruling was upheld by the Ninth Circuit in 2004, and the United States did not seek review of that decision, which became a final judgment.

While the initial lawsuit was pending, Congress passed a statute declaring the cross a "national memorial" commemorating World War I. Then, during the pendency of the appeal before the Ninth Circuit, Congress passed a land-transfer statute that directed the Secretary of the Interior to trade a one-acre parcel of land surrounding the monument for a five-acre privately owned parcel elsewhere in the Mojave, which had been offered by a supporter of the monument. Under the land- transfer agreement, the acre would revert back to the United States if the VFW failed to maintain a monument there. After the Ninth Circuit upheld the original decision, Buono returned to district court, moving to enforce the original injunction by having the land-transfer statute voided. The question before the district court was whether the

statute was "a bona fide attempt to comply with the injunction" or "a sham aimed at keeping the cross in place." The district court ruled that Buono, as the party who had won the initial injunction, had standing to challenge the statute and that the land transfer was a violation of that injunction. The court ordered the Government to enforce the original injunction, and enjoined the land transfer from taking place. The Ninth Circuit again affirmed. Through a three-Justice plurality opinion by Justice Kennedy and a two-Justice concurring opinion by Justice Scalia, the Court reversed.

The plurality opinion by Justice Kennedy concluded first that Buono had standing to challenge the statute. Because the Government did not appeal the first Ninth Circuit ruling affirming the initial injunction, that ruling — including its finding of standing — is final and can no longer be reconsidered. And "[h]aving obtained a final judgment granting relief on his claims, Buono had standing to seek its vindication." The plurality rejected the Government's contention "that Buono was not seeking to vindicate — but rather to extend — the 2002 injunction." In the plurality's view, the Government conflated the merits inquiry with the standing inquiry: "the Government in essence contends that the injunction did not provide a basis for the District Court to invalidate the land transfer." The plurality therefore turned to the merits.

The plurality concluded that the district court failed to consider the appropriate factors when it enjoined the land-transfer statute. The land-transfer statute constituted a material change in circumstances that may have altered the appropriateness of the original grant of relief. Rather than "acknowledge the statute's significance," the district court deemed Congress' intent "illegitimate." "By dismissing Congress's motives as illicit, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage." This includes the original intent of the monument's creators, the long history of the cross in that location, and the ultimate designation of the cross as a national memorial. The plurality found that the initial injunction had forced the Government to choose between either "conveying disrespect" by removing the cross, or defying the court's order, and that the district court failed to consider whether the land-transfer statute was an appropriate alternative that avoided both choices. The lower court should have considered whether the land-transfer statute accomplished the goals of the original injunction by essentially moving the cross to private land, thus no longer making it likely that a reasonable observer would find the monument to be an endorsement of religion. The plurality remanded the case to the district court to "conduct a proper inquiry as described above." Chief Justice Roberts, who joined the plurality opinion, filed a three-sentence concurring opinion. Justice Alito filed an opinion concurring in part and concurring in judgment. He stated that he agreed with the plurality opinion "in all respects but one": rather than remanding the case, he would hold that the land-

transfer statute may be implemented. The land transfer, in his view, "eliminate[d] any perception of religious sponsorship" on the part of the Government.

Justice Scalia wrote an opinion concurring in judgment, which Justice Thomas joined. He did not reach the merits, concluding instead that Buono lacked standing, and that his motion to enforce the original injunction should have been denied on that ground. Justice Scalia agreed that Buono has standing to enforce the original injunction. He found, however, that Buono was seeking new, additional relief by attempting to block the land transfer. "The only reasonable reading of the original injunction, in context, is that it proscribed the cross's display on federal land. . . . The District Court's 2005 order purporting to 'enforce' the earlier injunction went well beyond barring the display of the cross on public property." In Justice Scalia's view, Buono's standing to bring the first action therefore did not carry over into standing to bring the second action.

Justice Stevens, joined by Justices Ginsburg and Sotomayor, dissented. He agreed that Buono had standing, but concluded that the district court had acted properly in enjoining the land transfer. According to the dissent, whatever the original motivation for erecting the monument, the cross was a sectarian symbol first and foremost, and that the reasonable perception of government endorsement of this sectarian symbol was reinforced by Congress' repeated interventions on behalf of the cross since 2000 — ranging from refusing to allow it to be removed to declaring it a national monument to agreeing to a "land swap" that attempted to prevent the enforcement of the original ruling. In the dissent's view, transferring ownership of one acre of land, out of a 1.5 million acre preserve, did not sufficiently eliminate the appearance of government entanglement in religion.

Justice Breyer wrote a separate dissent. He, too, agreed that Buono had standing, but in his view the finality of the original order ended the Establishment Clause questions surrounding the monument. The only issue in the case, he felt, was whether the district court acted within its discretion in enjoining the land transfer in order to effectuate its original ruling ordering the removal of the cross. In Justice Breyer's opinion, there was no abuse of discretion, and the lower courts' rulings should have been affirmed.

United States v. Stevens, 08-769. By an 8-1 vote, the Court held that the federal statute criminalizing the commercial creation, sale, or possession of the depiction of a live animal being illegally and intentionally wounded, tortured, or killed is overbroad and therefore facially invalid under the First Amendment. Congress enacted 18 U.S.C. §48 in 1999 in response to the production of so-called "crush videos," which showed animals being killed in cruel fashion. The law excluded works with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." Respondent Robert Stevens maintained a business selling video depictions of pit bulls in dogfights, and dogs attacking other animals. He contends that when

and where the films of dogfights were made, dogfighting was legal, a fact the United States disputes. The United States charged Stevens with three counts of violating §48, based upon his sale of two dogfight videos and one showing dogs attacking a farm animal. Stevens was convicted of all three counts. On appeal, the Third Circuit, sitting en banc, reversed his conviction. The Third Circuit found that the law was facially invalid under the First Amendment, applying a "strict scrutiny" standard. The statute, it held, was neither narrowly tailored nor the least restrictive means of preventing animal cruelty. In an opinion written by Chief Justice Roberts, the Court affirmed.

The Court first held that depictions of animal cruelty were within the ambit of the First Amendment, rejecting the Government's argument that such speech was — like obscenity, defama-tion, incitement, and fraud — simply outside the scope of the Free Speech clause. The Court found that depictions of animal cruelty were not among the "historic and traditional categories long familiar to the bar" that are left unprotected by the First Amendment. And the Court rejected the notion that speech is unprotected if its value is outweighed by its societal cost, calling that standard "highly manipulable" and "startling and dangerous" as "a free-floating test for First Amendment coverage." While the Court recognized that it had in the past described certain unprotected speech as that where "the evil to be restricted so overwhelmingly outweighs the expressive interests . . . that no process of case-by-case adjudication is required" (quoting *New York v. Ferber*, 458 U.S. 747 (1982)), it held that this language was "descriptive" of historically unprotected speech. That language did not, however, "establish[] a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."

Turning to the facial challenge, the Court found that §48 created "a criminal prohibition of alarming breadth." The Court observed that the statute did not require that the depicted conduct be cruel; it merely required a depiction of an animal being "maimed" or "killed," words that should be given their ordinary meaning. Nor, held the Court, does the statute's limitation to depictions of "illegal" conduct adequately narrow it. "There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty." Exacerbating the problem is that §48 applies to depiction of conduct that is illegal in the place where it is sold or possessed, even if it the conduct was lawful where created. Thus, a depiction of perfectly lawful hunting (in a video or a widely circulated hunting magazine) would violate §48 if it makes its way into the District of Columbia, which proscribes hunting. The same would be true of depictions of livestock slaughter and other agricultural practices that were legal where performed, but shown in a state that banned that particular method.

The Court rejected the Government's contention that the exceptions clause of §48 — allowing "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value" — adequately protects this broad range of legitimate speech. The Court found that "[m]uch speech does not" fall within the enumerated categories. For example, hunting videos and magazines are primarily meant for "entertainment value" only. The Court dismissed the Government's claim that such an overbroad application of the statute would not come to pass due to its proper exercise of prosecutorial discretion. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." The Court noted that the prosecution of Stevens was itself an example of prosecutorial broadening of a law that was originally intended to apply only to "crush" videos. The statute, the Court concluded, was overbroad as written, and invalid under the First Amendment.

In his dissent, Justice Alito wrote that the statute should be read so as to avoid a constitutional conflict. He would hold that the statute applies only when the acts that are depicted are illegal under anti-cruelty laws, and that any depiction whose value is "not trifling" is "serious" enough to be exempted by the exceptions clause. Justice Alito pointed to the legislative record as evidence that Congress had no intention of banning hunting videos, and held that even if there were a few hypothetical situations where such an interpretation were possible, it still would not amount to showing that the law prohibited a "substantial amount of protected speech." Justice Alito then drew upon the principles set forth in *Ferber*, which exempted child pornography from First Amendment protection because the only effective means of prohibiting the criminal acts perpetrated upon the children in those depictions was to outlaw the depictions themselves. He argued that the same reasoning applied to the production of "crush videos" and dogfight videos: the conduct they depict is universally illegal within the United States; it is nearly impossible to prosecute the creators of such videos for the acts themselves (because the identities of the parties, and the date and location of the acts, cannot be determined); the market for the depictions itself creates the criminal behavior; and the harm caused by the underlying crimes "vastly outweighs any minimal value that the depictions might conceivably be thought to possess."

§1983 AND BIVENS ACTIONS

Perdue v. Kenny A., 08-970. By a 5-4 vote, the Court held that an attorney's fee based on the "lodestar" under a federal fee-shifting statute can be enhanced based on superior performance only in "extraordinary circumstances," where "specific evidence" shows "that the lodestar fee would not have been adequate to attract competent counsel." The case involved a 42 U.S.C. §1983 class action brought by respondents, who were 3,000 Georgia foster care children, against petitioners, the Governor and other Georgia state officials, for deficiencies in the foster-care system. Following mediation, the parties entered into a consent decree, which

was approved by the court. The settlement did not address the award of attorney fees under 42 U.S.C. §1988. The district court awarded $10.5 million in fees, $6 million of which were a result of the lodestar calculation. The remainder of the award resulted from an enhancement the district court found was justified based on: (1) the advancement of expenses by counsel; (2) counsel was not paid on an ongoing basis as the work was performed; (3) counsel's fee was contingent on the outcome of the case; (4) the attorneys exhibited the highest degree of skill, commitment, dedication, and professionalism; and (5) the results obtained were extraordinary. The Eleventh Circuit affirmed the fee award, though the panel had splintered views on the propriety of the enhancement. In an opinion by Justice Alito, the Court reversed the judgment.

The Court observed that the lodestar method, under which the prevailing market rate is multiplied by the hours worked on the case, has been deemed the "guiding light" of fee determination, and that it is an objective and easily administered calculation. The Court then set out six rules it derived from its fee jurisprudence: (1) a reasonable fee is that which is sufficient to induce an attorney to take the case; (2) the lodestar calculation results in a fee that is presumptively sufficient; (3) an enhancement may be awarded only in rare and exceptional circumstances; (4) this enhancement may not be based on a factor already accounted for in the lodestar method; (5) a fee applicant bears the burden of proof as to the necessity of a fee enhancement; and (6) the fee applicant must produce specific evidence to support an enhancement. The Court then turned to whether the quality of an attorney's performance may be the basis for this enhancement, and concluded that it may in the "rare" and "exceptional" case where the lodestar calculation does not adequately measure the true market value of the particular attorney.

The Court described three situations where an enhancement based on superior performance may be permissible. The first is when the hourly rate used accounts only for the attorney's years of admission to the bar, and not his expertise and skill. In such a case, "the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate." Second, "an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." In that case, "the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses." Third, and similarly, an enhancement may be appropriate if there is an "exceptional delay in the payment of fees." Again, the enhancement should be limited to foregone interest caused by the delay. By contrast, the Court found the $4.5 million (75%) enhancement here to be arbitrary. "Why, for example, did the court grant a 75% enhancement instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?" The Court therefore reversed and remanded for application of the standards enunciated in the opinion.

Justices Kennedy and Thomas each filed brief concurring opinions. Justice Breyer authored an opinion concurring in part and dissenting in part, which was joined by Justices Stevens, Ginsburg, and Sotomayor. The four-Justice opinion maintained that the majority should have limited its decision to the narrow question presented, which was whether the lodestar can be enhanced in extraordinary circumstances based on attorney performance. The Court was unanimous in answering that question yes. The four Justices dissented from the remainder of the Court's opinion and its consideration of the district court's enhancement in this case, finding it inappropriate and disagreeing with its conclusion. The dissent found this case to be the rare and exceptional one warranting enhancement, and emphasized that: (1) this case was unusually important in the civil rights arena and demanded a high degree of skill; (2) the lawsuit was lengthy and arduous; (3) in the face of these challenges, the results obtained were exceptional; and (4) the district court was extremely impressed by the attorneys and noted so in its order.

MISCELLANEOUS – CONSTITUTIONAL CASES

Alvarez v. Smith, 08-351. The Court found the case moot, and therefore vacated the Seventh Circuit's judgment and remanded the case with instructions to dismiss. The Court had granted certiorari "to determine whether Illinois law provides a sufficiently speedy opportunity for an individual, whose car or cash police have seized without warrant, to contest the lawfulness of the seizure." Specifically, the Seventh Circuit held that the nearly five months that can elapse between the deprivation and the required forfeiture hearing violates the federal Due Process Clause. "At the time of oral argument, however, [the Court] learned that the underlying property disputes have all ended." The state had returned the cars to three plaintiffs; two of the plaintiffs apparently conceded that the state could keep the cash seized from them; and the final plaintiff and the state agreed that the state would return some, but not all, of the cash seized from her. Accordingly, in an opinion by Justice Breyer, the Court held that "there is no longer any actual controversy between the parties about ownership or possession of the underlying property."

The Court found that no "special circumstance" — such as an issue that is "capable of repetition" while "evading review" — was present here. Indeed, the plaintiff/respondents could bring damages actions based on the very conduct in question. The more difficult issue, found the Court, was whether to vacate the Seventh Circuit's decision under *United States v. Munsingwear,* 340 U.S. 36 (1950). In *Munsingwear*, the Court held that it is ordinarily appropriate under 28 U.S.C. §2106 to vacate the lower court judgment in a moot case because doing so "clears the path for future relitigation of the issues between the parties," preserving "the rights of all parties," while prejudicing none "by a decision which . . . was only preliminary." In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18 (1994),

however, the Court held that "[w]here mootness results from settlement," rather than "happenstance," the "losing party has voluntarily forfeited his legal remedy . . . [and] thereby surrender[ed] his claim to the equitable remedy of vacatur." The Court here concluded that "this case more closely resembles mootness through 'happenstance' than through 'settlement' — at least the kind of settlement that the Court considered in *Bancorp*." The Court noted that the judgment in this case was mooted by the routine resolution of the state court proceedings, and that none of those proceedings appeared to be motivated by the existence of the federal litigation. Justice Stevens filed an opinion concurring in part and dissenting in part which agreed that the case was moot and should be dismissed, but contended that under *Bancorp* the Seventh Circuit opinion should not have been vacated.

United States v. Comstock, 08-1224. By a 7-2 vote, the Court held that the Necessary and Proper Clause granted Congress the authority to enact 18 U.S.C. §4248, which authorizes the civil commitment of dangerous sexual predators after they complete their federal prison sentences. A "sexually dangerous" person is someone who has engaged in sexual violence or child molestation, who is sexually dangerous to others, and who suffers from a severe mental illness that would make it difficult for him to refrain from repeating his behavior if released. Upon such a certification from the Attorney General, the district court conducts an evidentiary hearing to determine if the person is, in fact, sexually dangerous. If the court determines, by clear and convincing evidence, that the person meets the definition of sexually dangerous, it must commit the person to federal custody. At that time, the Attorney General is directed to make reasonable efforts to transfer the person to an appropriate state authority or agency. Federal confinement continues until a state assumes responsibility for the person or the person is no longer considered "sexually dangerous." Respondent Graydon Comstock and four other men challenged the constitutionality of the statute when the Attorney General attempted to hold them under it at the conclusion of their prison terms. The men claimed, among other things, that the statute exceeded Congress' power under Article I. Both the district court and the Fourth Circuit agreed, finding that the law was not within the "enumerated powers" of Congress set forth in the Constitution. The Court reversed through an opinion by Justice Breyer.

The Court ruled that "five considerations, taken together," lead to the conclusion that the Constitution, through the Necessary and Proper Clause, "grants Congress sufficient power to enact §4248." First, citing *McCulloch v. Maryland*, 4 Wheat 316 (1819), the Court stated that "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful or conducive to the authority's beneficial exercise" (internal quotation marks omitted). And the Court noted that recent decisions have reiterated that, "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular

federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." The Court noted that the Constitution expressly authorizes the creation of only a few, specified federal crimes (such as treason and piracy), but that it "nonetheless grants Congress broad authority to create such crimes." Congress therefore also has the power to impose criminal sentences, build prisons, and enact laws regarding prison administration. Those powers are not "explicitly mentioned in the Constitution," but instead derive from the Necessary and Proper Clause.

Second, the Court stated that "the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." The Court noted that since the late 1940s, Congress has authorized the Bureau of Prisons to retain custody of inmates who have finished their sentences but are deemed dangerous and insane. The current statute, the Court held, simply focuses on a specific type of danger and mental illness related to sexual violence. Third, the Court found that "Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in the federal system, even if doing so detains them beyond the termination of their sentence." The Court reasoned that the "Federal Government is the custodian of its prisoners" and therefore "has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose" — just as the government could detain a federal prisoner infected with a communicable disease.

Fourth, the Court stated that "the statute properly accounts for state interests." It does this by requiring the Attorney General to attempt to turn the person in custody over to the state where that person resides or was tried. Moreover, the states are entitled, under the statute, to assert their authority over the person at any time and assume custody of him. Fifth and finally, the Court found that "the links between §4248 and an enumerated Article I power are not too attenuated." According to the Court, "the same enumerated power that justifies the creation of a federal criminal statute . . . justifies civil commitment under §4248 as well." The Court rejected Comstock's conten-tion that "the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress."

Justice Kennedy filed an opinion concurring in judgment, in which he cautioned that the Constitution does not allow for an infinite extension of federal power in the name of the Necessary and Proper Clause. He asserted that the "rationally related" test the majority set forth should be treated as more stringent than the "rational basis" test applied in due process challenges. In applying the Necessary and Proper Clause, he stated, there must be a "tangible link" between the law and the authority under which Congress acts, and not "a mere conceivable rational relation." Justice Kennedy also stated that, under the Tenth Amendment,

"[i]t is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." He concluded that the provisions of §4248 that allow the states to assert their authority over any person the federal government seeks to detain ensured that the federal government did not exceed the limits on its power.

In a separate opinion concurring in the judgment, Justice Alito also asserted that the majority opinion was overbroad in its language. He agreed, however, that Congress has the constitutional authority to criminalize certain behavior, and thus has the power to operate prisons — which includes a responsibility to not release sexually violent, mentally ill prisoners back into the general population without undertaking some effort to protect the public from them. Although "the Necessary and Proper Clause does not give Congress carte blanche," he wrote, this is not a case where there was merely a "rational basis" to "perceive an attenuated link" between the law and Congress' power to pass criminal statutes; rather, the link is "substantial."

Justice Thomas authored a dissenting opinion that Justice Scalia joined. The dissent argued that §4248 "executes no enumerated power," and thus was beyond Congress' authority. The dissenters stated that the power to protect communities from the dangerously mentally ill rests with the states; the federal government's legitimate confinement of prisoners under a penal statute does not create a "necessary" power to continue to confine them due to mental illness *after their sentences have run*. The dissent agreed with the majority that Congress may "criminalize conduct that interferes with enumerated powers," and therefore may also establish prisons and laws concerning the care of prisoners. But the civil detention statute, they argued, goes beyond that power necessary to effectuate Congress' authority to criminalize certain conduct. The dissent distinguished federal statutes permitting pre-trial detention of people incompetent to stand trial, for the government was entitled to hold people prior to trial in order to effectively enforce its valid criminal laws. And in the dissent's view, if §4248 were not on the books, the states would use their own civil commitment statutes to gain custody over sexually violent, mentally ill people that the federal government was about to let out of prison.